

A **DATO' SEE TEOW GUAN v. YEOH JIN HOE & ORS**

HIGH COURT MALAYA, KUALA LUMPUR

LAU BEE LAN J

[CIVIL SUIT NO: 22 NCC-152-05-2014]

17 MAY 2015

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CIVIL PROCEDURE: *Striking out – Application for – Whether plaintiff entitled to sue in personal capacity in respect of minority shareholders or derivative action – Whether plaintiff must define or disclose shareholders on whose behalf plaintiff represented – Whether plaintiff correctly intitled claim – Whether action misconceived – Whether plaintiff's claim frivolous, vexatious and abuse of court process*

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COMPANY LAW: *Derivative or representative actions – Bringing action in name of company – Whether action properly constituted – Whether plaintiff entitled to sue in personal capacity in respect of minority shareholders or derivative action – Whether plaintiff must define or disclose shareholders on whose behalf plaintiff represented – Whether action fell within exception to rule in Foss v. Harbottle – Whether action filed in bad faith*

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The applications, filed by the first to seventh defendant essentially sought to strike out the plaintiff's amended writ of summons and amended statement of claim. The grounds raised by the defendants were, *inter alia*, that the action was not properly constituted and was misconceived for reasons that (i) the plaintiff was not entitled to sue in a personal capacity in respect of what was a minority shareholders or derivative action; (ii) the plaintiff was not entitled to sue in a representative capacity on behalf of and for the benefit of the sixth defendant ('Kian Joo'); (iii) the plaintiff was not entitled to sue in a representative capacity in a minority shareholders or derivative action without defining or disclosing the shareholders on whose behalf the plaintiff was representing; (iv) there was no privity of dealings between the plaintiff and the third defendant ('Aspire') or between the plaintiff and the Employees Provident Fund ('EPF') in relation to the alleged wrongdoings committed against the plaintiff in his personal capacity; (v) there was no breach of the rights and interests of Kian Joo as a result of the offer from Aspire giving rise to a cause of action, whether on behalf of the shareholders or for the benefit of Kian Joo, against Aspire; (vi) the plaintiff as the Executive Director of

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Kian Joo was at all material times involved in the deliberations of its Board of Directors, including the appointments and representations in compliance with the Main Market Listing Requirements ('Listing Requirements') of Bursa Malaysia Securities Berhad ('Bursa'), in respect of the offer from Aspire; (vii) the plaintiff was pre-empting the due process in respect of the jurisdiction of the regulatory authorities, including Bursa, and the obligations of Kian Joo under the Listing Requirements in response to the Aspire offer; (viii) the plaintiff was assuming for himself under the guise of a minority

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shareholders or derivative action, the right to decide for the shareholders of Kian Joo on the Aspire offer, although the requisite announcements and circular to the shareholders had not been completed by Kian Joo. The grounds upon which the seventh defendant ('D7') premised its application were: (i) the plaintiff's complaints concerning the 'Aspire Bid' did not concern D7; (ii) the complaints raised by the plaintiff in respect of his alleged unlawful ouster from the Board of Directors of D7 were allegations raised in his personal capacity as a former Director of D7 and did not concern Kian Joo; (iii) there was no requirement in law or in the articles of association of D7 for the lodgment of the original corporate representative certificates prior to an annual general meeting ('AGM'); and (iv) how Kian Joo as a shareholder exercised its vote at the AGM of D7 in relation to resolution 7 was up to Kian Joo to decide and it did not concern D7.

Held (allowing defendants' applications):

- (1) On the pleadings, the plaintiff assumed a dual capacity in what was essentially a minority shareholders or derivative action, first in 'his personal capacity in relation to wrong doings committed against him' and secondly in 'a representative capacity on behalf of and for the benefit of the Kian Joo'. (para 11)
- (2) There was nothing mentioned in the amended statement of claim as to dealings between the plaintiff in his personal capacity and the fourth and fifth defendants, neither was there any mention as to dealings between Kian Joo the fourth defendant ('D4') and the fifth defendant ('D5'), which may give rise to a cause of action against D4 and D5. The alleged wrongdoings committed against the plaintiff were in respect of his so called unlawful ouster from the Board of Directors of D7 for which the plaintiff was claiming against D7. Thus, the action was not properly constituted in that the plaintiff was not entitled to sue in a personal capacity in respect of what was a minority shareholder or derivative action. (paras 13 & 14)
- (3) The representative capacity of the plaintiff in terms of the persons sought to be represented by the plaintiff was not stated in the title of the amended writ and the amended statement of claim. Instead, what was stated was the effect of the representative action, *ie*, 'for the benefit of Kian Joo Can'. Hence, the action was incompetent as the plaintiff had failed to correctly intitle the claim *ie*, framing the action as a representative one by the shareholder 'on behalf of himself and all the shareholders' in accordance with the principles governing derivative action. Further, the pleadings could not be cured by amendment and therefore ought to be struck out as disclosing no cause of action. (paras 21 & 27)
- (4) The rule in *Foss v. Harbottle* is that if a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury, unless it falls within any of the

- A exceptions *ie*, (i) *ultra vires* act; (ii) fraud on the minority; (iii) special majorities; (iv) personal rights; and (v) when justice of the case requires it. The relief sought by the plaintiff against the defendants, with the exception of D7, were all in relation to the Aspire Bid, whereas, the relief sought by the plaintiff against D7 were personal claims. There was
- B no justification for the plaintiff's pleadings and what was stated in the pleadings was a bare statement made with an attempt to bring a derivative claim of the 'justice of the case exception'. (paras 31, 35 & 38)
- (5) The plaintiff did not take issue with any independent directors and had not brought up any complaint in respect of Aspire Bid formally to allow the Board of Directors to decide collectively. Hence, the action filed by the plaintiff was made in bad faith and for a collateral purpose. Further, the plaintiff's claim was factually incorrect as the plaintiff did not produce any evidence to the independent directors for their consideration; hence, Kian Joo's Board had not 'material credible information' to find that the first defendant ('D') and the second defendant ('D2') were persons connected. (paras 40 & 42)
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- E (6) The plaintiff's remedy was that he was at liberty to be present during the EGM to air his grouses and to convince the other shareholders of his position as the Aspire Bhd requires 75% of the shareholder's approval. (para 43)
- (7) The action was misconceived as the plaintiff was pre-empting the due process in respect of the jurisdiction of the regulatory authorities, including Bursa and the obligations of Kian Joo under the Listing Requirements of Bursa in response to the Aspire offer. It could not be denied that the Aspire Bid was subject to strict regulatory requirements, overseen by the main advisors, independent non-executive advisors and the legal advisor and ultimately to Bursa Malaysia. (para 44)
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- G (8) The plaintiff's retirement from the board of D7 resulting from the failure to pass resolution 7 had nothing to do with the affairs of Kian Joo and therefore, there was no basis, in fact and in law, for a derivative action to be brought by the plaintiff against D7 for this. Thus, the claim against D7 ought to be struck out. Further, there were no merits regarding the plaintiff's complaint against D7's AGM. The plaintiff's contract with D7 did not preclude the shareholders of D7 from voting for any resolution to remove the plaintiff, what more to vote against any resolution for his re-election. Neither were the shareholders of D7 owed any fiduciary duties or obligations as to how they exercise their votes nor was D7 to regulate their voting; it was entirely up to the shareholders as to how they cast their votes. (paras 48, 49 & 51)
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- (9) D7 had complied with the requirement of s. 128 of the Companies Act 1965 when the relevant documents on the Aspire Bid were circulated to all the directors including the plaintiff. However, the minutes of D7's AGM was not circulated to the plaintiff since he was no longer a director of D7. (para 52) A
- (10) There was no requirement that an original of the certificate of appointment of authorised corporate representative ('the certificate') need to be lodged prior to an AGM. If there was any challenge to the validity of D1's representation, it ought to be raised at the meeting. If there was to be any challenge to the certificate, it had to be at the AGM itself, otherwise D1 must be taken to have validly cast the vote of the corporate shareholder. (paras 53 & 55) B
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- (11) Accordingly, the plaintiff's claim was frivolous, vexatious or otherwise was an abuse of the process of the court. The relief sought by the plaintiff could not stand and ought to be struck out. (para 61) D

Case(s) referred to:

- Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551 CA (*refd*)
- Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC (*refd*)
- Biala Pty Ltd and Another v. Mallina Holdings Ltd and Others* [1993] 11 ACSR 785 (*refd*) E
- Burland v. Earle* [1902] AC 83 (*refd*)
- Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 CA (*refd*)
- Connolly v. Seskin Properties Ltd and Others* [2012] IEHC 332 (*refd*)
- Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1990] 1 LNS 91 SC (*refd*) F
- Fanning v. Murtagh* [2009] 1 IR 551 (*refd*)
- Foss v. Harbottle* [1843] 67 ER 189 (*refd*)
- Fraser v. Cooper* [1883] 21 Ch. D 718 (*refd*)
- Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd and Another Case* [2012] 7 CLJ 407 HC (*refd*)
- Maori Development Corporation Ltd v. Power Beat International Ltd* [1995] 2 NZLR 568 (*foli*) G
- Mohd Ahmad v. Yang Dipertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135 (*dist*)
- Pal v. Chatterjee* [2013] OJ No. 924 (*refd*)
- Prudential Assurance Co Ltd v. Newman Industries Ltd and Others (No 2)* [1982] Ch 204 (*refd*) H
- R v. Securities and Futures Authority ex p Panton (Unreported)* (*refd*)
- Raja Abdullah Wahman bin Raja Sulaiman & Anor v. Nikseng Plantations Sdn Bhd & Ors And Niksian Holdings Sdn Bhd & Ors* [1994] 1 CLJ 287 HC (*refd*)
- Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 CA (*refd*)
- Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC (*refd*) I
- Tuan Ishak bin Ismail v. Leong Hup Holdings Bhd & 5 Other Appeals* [1996] 1 CLJ 393 CA (*refd*)

A Legislation referred to:

Companies Act 1965, ss. 128(1), 147(3), (4), (5)

Rules of Court 2012, O. 6 r. 2(1)(a), (b), O. 18 r. 19(1)(b), (c), (d)

Companies Act 1955 [NZ], s. 143(1)(a), (2)

For the plaintiff - Benjamin John Dawson (Eileen Othman, Ooi Ai Yen & Koay Weng Man with him); M/s Benjamin Dawson

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For the 1st defendant - Conrad Young (Gopal Sreenevasan & Leong Phaik Leng with him); M/s Sreenevasan Young

For the 2nd defendant - Ranjit Singh (Jeffrey Lee with him); M/s Ranjit Singh & Yeoh

For the 3rd defendant - Robert Lazar (Alvin Julian & Ankit Sanghvi with him); M/s Shearn Delamore & Co

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For the 4th & 5th defendants - Porres Royan (T Sudhar with him); M/s Shook Lin & Bok
For the 6th defendant - Robert Low (James Khong with him); M/s Ranjit Ooi & Robert Low

For the 7th defendant - Tharminder Singh Ginder Singh (Mohd Izral Mohamed Khairy & LL Woon with him); M/s Izral Partnership

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Reported by S Barathi

JUDGMENT**Lau Bee Lan J:****E**

[1] There are six striking out applications filed by D4 & D5, D3, D7, D6, D1 and D2 ('D4 & D5, D3, D7, D6, D1 and D2' or 'defendants' as the case may be) all respectively marked as encls.15, 17, 19, 21, 29 and 30. *Vide* these notices of applications the defendants are essentially seeking to strike out the plaintiff's amended writ of summons and amended statement of claim dated 16 May 2014 pursuant to O. 18 r. 19(1)(b), (c) or (d) of the Rules of Court 2012 ('the RC 2012'). The grounds which the respective defendants except for D7 mounted on are similar and are as follows:

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(a) that the action is not properly constituted in that the plaintiff is not entitled to sue in a personal capacity in respect of what is a minority shareholders or derivative action;

(b) that the action is not properly constituted in that the plaintiff is not entitled to sue in a representative capacity on behalf of and for the benefit of Kian Joo Can Factory Berhad (D6) ('Kian Joo');

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(c) that the action is not properly constituted in that the plaintiff is not entitled to sue in a representative capacity in a minority shareholders or derivative action without defining or disclosing the shareholders on whose behalf the plaintiff is representing;

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(d) that the action is misconceived in that there is no privity of dealings between the plaintiff and Aspire Insight Sdn Bhd (D3) ('Aspire') or between the plaintiff and the Employees Provident Fund ('EPF') in relation to the alleged wrongdoings committed against the plaintiff in his personal capacity;

- (e) that the action is misconceived in that there is no breach of the rights and interests of Kian Joo as a result of the offer from Aspire giving rise to a cause of action, whether on behalf of the shareholders or for the benefit of Kian Joo, against Aspire; A
- (f) that the action is misconceived in that the plaintiff as executive director of Kian Joo was at all material times involved in the deliberations of its board of directors, including the appointments and representations in compliance with the Main Market Listing Requirements ('listing requirements') of Bursa Malaysia Securities Berhad ('Bursa'), in respect of the offer from Aspire; B
- (g) that the action is misconceived in that the plaintiff is pre-empting the due process in respect of the jurisdiction of the regulatory authorities, including Bursa, and the obligations of Kian Joo under the listing requirements in response to the Aspire offer; C
- (h) that the action is misconceived in that the plaintiff is assuming for himself under the guise of a minority shareholders or derivative action, the right to decide for the shareholders of Kian Joo on the Aspire's offer, although the requisite announcements and circular to the shareholders have not been completed by Kian Joo. D
- [2] The grounds which D7 premised its application are: E
- (a) The plaintiff's complaints concerning the "Aspire Bid" does not concern D7.
- (b) The complaints raised by the plaintiff in respect of his alleged unlawful ouster from the board of directors of D7 are allegations raised in his personal capacity as a former director of D7 and do not at all concern D6. F
- (c) There is no requirement in law or in the articles of association of D7 for the lodgment of the original corporate representative certificates prior to an annual general meeting. G
- (d) How D6 as a shareholder exercised its vote at annual general meeting of D7 in relation to Resolution 7 is up to D6 to decide and it does not concern D7.
- [3] At the outset, I wish to state that the defendants opted to proceed in this manner during oral submission, commencing with counsel for D3, Mr Robert Lazar who dealt with the common issues followed by counsel for D4 and D5, Mr Porres Royan, counsel for D1, Mr Conrad Young, counsel for D2, Mr Ranjit Singh, counsel for D6, Mr Robert Low and counsel for D7, Mr Tharminder Singh for D7 who all dealt with specific issues. H
- [4] It was expressed by D3, D4 & D5, D1, D2, D6 and D7 that they accepted the other's submission. I

A Background Facts

[5] On 26 November 2013, D3 made an offer to D6 to acquire the entire business and undertaking of D6 including all of its assets and liabilities. The consideration offered by D3 for this proposed acquisition is a sum of RM1,465,753,693 and this sum represents approximately RM3.30 per ordinary share of RM0.25 each in D6. The terms of this offer are set out in the following documents:

- (a) Letter of offer dated 26 November 2013 from D3 to D6, exh. MHK-1;
- (b) Business sale agreement dated 24 March 2014, exh. MHK-2;
- (c) Property sale agreement dated 24 March 2014, exh. MHK-3;
- (d) Assets sale agreement dated 24 March 2014, exh. MHK-4.

The offer was accepted on behalf of D6 but is subject to the approval of the shareholders of D6.

[6] D3 has two shareholders namely:

- (a) Ekuiti Merdu Sdn Bhd a wholly owned subsidiary of the Employees Provident Fund ('EPF') who is also a direct shareholder of D6; and
- (b) Alleyways Sdn Bhd whose majority shareholder is D2 (Chee Khay Leong) who is also the Chief Operating Officer ('COO') and Executive Director of D6.
(see six paged chart cum notes tendered by D6 counsel)

[7] D6 is a listed entity and is therefore governed by various regulations and requirements set out by Bursa. In so far as D3's offer is concerned the most important of these is the listing requirements. The transaction in question would fall within the purview of the following provisions in the listing requirements:

- (a) According to para. 10.08 of the listing requirements the proposed sale of the entire business and undertaking of D6 to D3 is a related party transaction on account of the fact that EPF and D2 are interested parties; and
- (b) Para 10.11A of the listing requirements provides that the transaction is also regarded as a major disposal.
(see 6 paged chart cum notes tendered by D6 counsel to aid the court)

[8] In the premises, D3's offer would be subject to, *inter alia*, the following conditions imposed by the listing requirements (see 6 paged chart cum notes tendered by D6 counsel):

- (i) EPF and D2 are precluded from participating in any of the deliberations or voting on any resolution in relation to the offer made by D3 (para. 10.08(7) of the listing requirements); and

(ii) D6 would be required to convene a general meeting and obtain shareholder approval of at least 75% in value of the shareholders present and voting either in person or by proxy at the said meeting with regard to the offer (para. 10.08(2)(c) of the listing requirements).

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[9] In addition, D6 is also obliged to appoint a main adviser and an independent adviser to advise on, amongst other areas, whether the transaction is fair and reasonable so far as the shareholders are concerned and whether the transaction is to the detriment of the minority shareholders (paras. 10.08(2)(c) & 10.08(3) of the listing requirements).

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[10] Having considered all of the defendants' submissions, the plaintiff's submission and their oral submissions, the court allowed O.I.T of prayers 1 and 2 of encls.15, 17, 19, 21, 29 and 30 with agreed costs of RM30,000 for each application. The reasons for the said decision are as follows.

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Capacity

[11] The plaintiff on pleadings assumes a dual capacity in what is essentially a minority shareholders or derivative action, first in "his personal capacity in relation to wrongdoings committed against him" and secondly in "a representative capacity on behalf of and for the benefit of the sixth defendant, Kian Joo Can Factory Bhd".

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[12] In respect of "personal capacity" this can be seen from para. 2 of the amended statement of claim:

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2. The Plaintiff is a shareholder and director of the 6th Defendant ('Kian Joo'). This suit is commenced in his personal capacity in relation to wrongdoings committed against him and on behalf of and for the benefit of Kian Joo where the interest of Kian Joo is concerned.

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[13] I find there is nothing mentioned in the amended statement of claim as to dealings between the plaintiff in his personal capacity and D4 or D5; neither is there any mention as to dealings between D6 and D4 and D5, which may give rise to a cause of action against D4 and D5. The alleged wrongdoings committed against the plaintiff are in respect of his so called unlawful ouster from the board of directors of Box-Pak (D7) for which the plaintiff is claiming against Box-Pak. This personal relief in the nature of re-instatement as a director and/or managing director of Box-Pak and damages to be assessed. This is evident from paras. 106 to 133 of the amended statement of claim and prayers (xii) to (xv) of the relief sought.

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[14] Thus the action is not properly constituted in that the plaintiff is not entitled to sue in a personal capacity in respect of what is a minority shareholder or derivative action.

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A [15] Authorities:

- (a) Chan & Koh on *Malaysian Company Law, Principles & Practice*, 2nd edn, 2006, citing the judgment of the Court of Appeal in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 and the judgment of the Privy Council in *Burland v. Earle* [1902] AC 83, states as follows:

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A plaintiff in a derivative action is seeking to enforce, not his personal right as a member of a company, but a right of the company which would otherwise escape redress. As such, it is quite obvious that the plaintiff cannot have a greater right to relief than the company itself would have if it were the plaintiff.

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- (b) Supreme Court Practice 1999 (vol. 1) on Form of Representative Proceedings para. 15/12/5 at p. 252 states as follows:

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It is irregular to name parties twice over in the record first in their personal capacity and secondly in their representative capacity (*Hardie & Lane v. Chiltern* [1928] 1 KB 663).

[16] In respect of representative capacity, it can be seen from the intitlement the plaintiff states as:

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DATO' SEE TEOW GUAN
(NRIC No. 450626-71-5007)
(Suing in a personal capacity and
in a representative capacity on behalf
and for the benefit of the 6th Defendant,
Kian Joo Can Factory Bhd) ... PLAINTIFF

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[17] However the representative capacity of the plaintiff in terms of the persons sought to be represented by the plaintiff is not stated in the intitlement.

[18] Authorities:

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- (a) The Court of Appeal in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 stated as follows:

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... a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. **The wrongdoers must be cited as defendants.** So too must the company. *The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so.* Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. *An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.* (emphasis added)

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- (b) The Supreme Court Practice 1999 (vol. 1) on Form of Representative Proceedings (para. 15/12/5) states as follows: A

Under O. 6, r.3, the representative capacity of the plaintiffs or defendants must be indorsed on the writ of summons (see *Re Royle* (1877) 5 Ch. D 540). The representative capacity of the plaintiffs or defendants ought also to be stated in the title of the writ and of the statement of claim (*Re Tottenham* [1896] 1 Ch 628) and it is desirable that it should also be stated in the body of the statement of claim and in the prayer. B

- [19] Order 6 r. 2(1)(a), (b) of our Rules of Court 2012 states as follows:

Before a writ is issued, it shall be endorsed: C

- (a) with a statement of claim, which shall comply with the requirements of Order 18, or, if the statement of claim is not endorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby; D
- (b) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues.

(emphasis added)

- [20] As to how the title to this action ought to have been framed can be seen from the case of *Prudential Assurance Co Ltd v. Newman Industries Ltd and Others* (No. 2) [1982] Ch 204. At p. 210 the English Court of Appeal stated that: E

As we have indicated, when, on January 9, 1976, the writ was issued the plaintiffs, Prudential Assurance Co Ltd, sued only in their personal capacity and sought only to establish that the June agreement had not been duly approved at a valid meeting. When the writ was first amended in red on March 8, 1976, *the title of the Plaintiffs was altered so as to indicate that it was suing on behalf of the Newman, the first defendant, using the time-honoured formula for this purpose "On behalf of themselves and all other shareholders, etc ..."*. F

(emphasis added) G

- [21] In my view D4 and D5 have correctly submitted that it is apparent from the title of the amended writ and the amended statement of claim itself, the representative capacity of the plaintiff in terms of the persons sought to be represented by the plaintiff is not stated. What is stated instead is the effect of the representative action, ie, "for the benefit of Kian Joo Can Factory Berhad". Hence this action is therefore incompetent as the plaintiff has failed to correctly intitle the claim, ie, framing the action as a representative one by the shareholder 'on behalf of himself and all the shareholders' in accordance with the principles governing a derivative action. H
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A [22] Authorities:

- (a) The Supreme Court Practice 1999 (Vol. 1) on Form of Representative Proceedings (para. 15/12/5) states as follows:

B The group or class of persons sought to be represented must be defined in the writ with sufficient clearness and precision. A claim to represent merely "some of" the members of a class without defining which members would not be maintainable (*Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 102 at 1033, 1034 ...

C (b) The Supreme Court Practice 1999 (Vol. 1) on Form of Representative Proceedings (para. 15/12/5) further states if any of the persons sought to be represented are excepted for any reasons, this fact must appear in the definition or description of the class and such persons must be made parties in their personal capacities (*Fraser v. Cooper* (1883) 21 Ch. D 718).

D [23] Thus the action is incompetent as the plaintiff failed to correctly intitle the claim by framing the action as a representative one by the shareholder 'on behalf of himself and all the shareholders' or the shareholders who are excepted or excluded ie, D5, Can-One International and EPF hold 32.9% and 10.03% respectively of the paid up capital of D6, Kian Joo (see 6 paged chart cum notes tendered by D6 counsel).

E [24] The case of *Raja Abdullah Wahman bin Raja Sulaiman & Anor v. Nikseng Plantations Sdn Bhd & Ors And Niksian Holdings Sdn Bhd & Ors* [1994] 1 CLJ 287; [1993] 2 AMR 38 was cited by learned counsel for the plaintiff (in oral submission on 31 July 2014) for the proposition that a derivative action is not a representative action. With respect, in my view it conflicts with the decision of the Court of Appeal in *Abdul Rahim bin Aki* which recognises that a derivative action is a representative action.

G [25] Learned counsel for the plaintiff submitted that (i) if the court considers the form for the derivative action as pleaded is not complete, the plaintiff undertakes to make the necessary amendment; and (ii) the court will not strike out a pleading which can be cured by amendment citing *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793.

[26] It is observed that the Court of Appeal in *Abdul Rahim bin Aki* at p. 562 G-I (CLJ); p. 431 A-C (MLJ) stated:

H In our judgment, the derivative action has not reached a stage where a plaintiff may disregard its procedural elements. We emphasize that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. The correct position in law is that stated by Jordan CJ (NSW) in *Australian Coal and Shale Employees Federation v. Smith* (1937) 38 SR (NSW) 48 at p. 54:

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Thus, if the wrongdoers control the company and successfully resist all attempts to cause the company to sue, an individual shareholder suing on behalf of himself and all other shareholders except the defendants may sue to remedy the wrong, joining the company as defendant: *Burland v. Earle*.

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(emphasis added)

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[27] I find for the reasons stated below, in the exercise of the court's discretion on the facts of this present case, I am of the view that no amendment could possibly save the pleadings and the particular pleading ought to be struck out as disclosing no cause of action (per Gopal Sri Ram JCA in *Shahidan Shafie (supra)* at p. 803 f).

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Substantive Aspect

Whether The Plaintiff's Claim Falls Within The 'Justice Of The Case' Exception

[28] As learned counsel for D3 correctly submitted, the approach to be adopted in a striking out application of this nature is that the onus is on the plaintiff to sustain a '*prima facie*' case (see *Prudential Assurance Co Ltd (supra)* at pp. 211B-C, 221A-C. This approach has been approved by the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 at p. 475; [1995] 1 MLJ 241 at pp. 254 and 255 as follows:

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As we have said in the introductory part of our judgment, the procedure adopted by the defendants was unorthodox, a blatant departure from the correct procedure which Templeman LJ pointed out in the *Prudential Assurance* case ...

We would demonstrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities.

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[29] The observations of Templeman LJ highlighted by the Supreme Court at p. 255 are:

This is evident from his observations ([1982] 1 Ch D 204 at p. 221A-B; [1982] 1 All ER 354 at p. 365; [1982] 2 WLR 31 at p. 47):

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In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v. Harbottle*. We desire, however, to say two things. First, as we have already said, we have no doubt whatever that Vinelott J erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivation action

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Further down the page Templeman LJ continued:

... In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie*

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- A case: (i) that the company is entitled to the relief claimed; and
(ii) that the action falls within the proper boundaries of the
exception to the rule in *Foss v. Harbottle* ...

[30] Thereafter the Supreme Court opined:

- B Lord Templeman's observations clearly enjoin the courts in such cases as
the present that this crucial issues must first be determined at a
preliminary hearing so that if the plaintiffs fail then *cadit quaestio*. What
happened before Vinelott J's court happened also in the instant case
though, admittedly, there was a hearing on a point of law on a different
issue altogether and there was no argument and no direction by the
learned judge to have this crucial issue argued and witnesses examined
before him in order to determine that issue.

- [31] It is trite law that the rule in *Foss v. Harbottle* (1843) 67 ER 189 is that
if a wrong has been done to a company, then it is the company which is the
proper plaintiff in an action brought to redress the injury. There are five
exceptions to the rule in *Foss v. Harbottle* namely, (i) *ultra vires* acts,
(ii) fraud on the minority, (iii) special majorities, (iv) personal rights and
(v) when the justice of the case requires it (per Edgar Joseph Jr J in *Tan Guan
Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep)
74; [1992] 1 MLJ 487 at 502 approved by the Court of Appeal in *Abdul
Rahim bin Aki* at pp. 426 I - 427 A-I).

[32] The plaintiff submitted that the rule in *Foss v. Harbottle* does not apply
and/or the plaintiff has brought himself within the exception of the rule and
the plaintiff has a maintainable cause of action based on:

- (a) personal action;
(b) special majority rule i.e. 75% majority is required to approve the
Proposed Acquisition. It cannot therefore be ratified by a simple
majority;
(c) an illegality under the CA and the LR would occur if Can-One
International is allowed to vote at the AGM; and
(d) the wrongdoers are in control through the indifference and apathy
of the Board of Directors of Kian Joo.

- [33] The plaintiff's "representative capacity" or purported "derivative"
action "for the benefit of the sixth defendant, Kian Joo Can Factory Bhd"
is brought in respect of the Aspire Bid as pleaded in paras. 136 to 140 of the
amended statement of claim whereby the plaintiff alleges that he purports to
bring this action – 'in the best interest of Kian Joo' (para. 134(i)); on the basis
'has caused detriment, loss, prejudice to Kian Joo and its shareholders'
(para. 134(iii)); 'breach of their (D1 and D2) fiduciary duties as a director
of Kian Joo' (para. 135); 'to the detriment of the Kian Joo' (para. 135(iv)).

[34] Then in para. 140 of the amended statement of claim, the plaintiff pleaded: A

140. Taking into account the facts set out herein, the Plaintiff states that without a derivative action, Kian Joo would not be able to seek any recourse and/or relief for the harm, damage and loss suffered as a result of the wrongful acts of Yeoh and Chee. B

[35] If one is to examine the relief sought by the plaintiff against the defendants with the exception of D7 in para. 141(i) to (xi) are all in relation to the Aspire Bid. Whereas, the relief sought by the plaintiff against Box-Pak (D7), particularly, para. 141(xiii) and (xiv) are personal claims. C

[36] In paras. 136 and 137 of the amended statement of claim, the plaintiff pleaded as follows: C

136. The Plaintiff states that the justice of the case grounded on the facts of this case have compelled him as a minority shareholder and director of Kian Joo to commence this derivative action for and on behalf of Kian Joo. This is because of the constituent of the shareholding and board of directors of Kian Joo wherein Yeoh is *de facto* in control. This is also apparent from the facts stated below. D

137. The board of directors of Kian Joo under the control of Yeoh is unlikely to entertain the Plaintiff's complaints herein. Indeed, the board of directors of Kian Joo had in their announcement dated 25.4.2014 to Bursa taken the position that Can-One and Yeoh are not persons connected to Chee. The conflict of interest of Yeoh in the Aspire Bid is inseparably connected with the allegations of breach of fiduciary duty by Yeoh and Chee herein. E

[37] On the 'justice of the case' exception, the plaintiff cited the case of *Biala Pty Ltd and Another v. Mallina Holdings Ltd and Others* [1993] 11 ACSR 785, Supreme Court. As highlighted by the learned plaintiff counsel, I agree that the Court of Appeal in *Abdul Rahim bin Aki's* case at p. 432 D-I & 433 A preferred the decision in *Biala's* case on the 'justice of the case' exception despite the reservation of the English Court of Appeal in *Prudential Assurance Co Ltd (supra)*, wherein the Court of Appeal stated "In [Biala] ... Ipp J expressed a view of the law with which we are inclined to agree". F G

[38] However in the context of the present case, I find that the plaintiff's case has not been properly or sufficiently particularised to fall within "a very strong case" as submitted by learned counsel for D2 (See *Connolly v. Seskin Properties Ltd and Others* [2012] IEHC 332 at para. 84 and *Fanning v. Murtagh* [2009] 1 IR 551 at p. 584 para. 96). I find there is merit when learned counsel for D1 highlighted "136. ... [T]his is because of the constituent of the shareholding and board of directors of Kian Joo wherein Yeoh is *de facto* in control. This is also apparent from the facts stated below. ... 137. The board of directors of Kian Joo under the control of Yeoh is unlikely to entertain the plaintiff's complaints herein" and thereafter submitted that there is H I

- A absolutely no justification for the plaintiff to plead as per paras. 136 to 137 and what is stated therein is a bare statement made with an attempt to bring a derivative claim of the 'justice of the case' exception. The reason for this is found in paras. 16 to 17.1 below.
- B [39] The following chronology of events to be read together with D6's chronology of events are pertinent to the issue at hand:
- C (a) 3 July 2013 – Appointment at board of directors' meeting of four independent non-executive directors of D6 comprising persons of good repute, namely, Y.A.M. Tunku Naquiyuddin Ibni Almarhum Tuanku Ja'afar, Y.A.M. Tunku Zain Al-Abidin Ibni Tuanku Muhriz, Dato' Tan Guan Cheong and Dato' Mah Siew Kwok. The plaintiff participated at the deliberations, approved and agreed to the said appointments and also their respective appointments onto the audit committee, nomination committee and the remuneration committee) (exh. KJ-4/264-268, encl. 21).
- D (b) 26 November 2013 – Aspire Bid was first brought to the attention of Kian Joo's board for its deliberation. Given that it is a deemed related party transaction due to Chee's interest in Aspire, Kian Joo was required to appoint an independent adviser, a main adviser and a legal adviser to advise the independent directors and shareholders of the fairness and reasonableness of the Aspire Bhd. D1 was tasked to engage, evaluate and negotiate these appointments and to make recommendations to the board. No adverse comments were made in respect of the Aspire Bid by any of the directors, including Anthony See (plaintiff).
- E
- F (c) 5 December 2013 – Deliberation of Aspire bid by the board attended by the main adviser, MIDF Amanah Investment Bank Bhd ('MIDF'), the independent adviser, Kenanga Investment Bank Bhd ('Kenanga') and Lee Choon Wan of Lee Choon Wan & Co as the legal adviser ('LCW'). MIDF advised that the Aspire Bid was reasonable and Kenanga took the view that the Aspire Bid was fair and reasonable and not detrimental to the interests of the non-interested shareholders.
- G
- (d) 13 December 2013 till end December 2013 – CB Richard Ellis (Malaysia) Sdn Bhd was appointed to carry out the valuation and it was plaintiff who confirmed the appointment.
- H (e) 10 January 2014 – Board meeting was held to deliberate on the Aspire Bid. By this time, the valuation reports were ready and furnished to MIDF and Kenanga. At this meeting, both MIDF and Kenanga maintained that the offer price in respect of the Aspire Bid was fair and reasonable. Plaintiff and his brother (See Teow Koon) expressly said that they were not against the disposal to D3 but would be pleased if a higher price could be obtained. The rest of the directors including the four independent directors, accepted the Aspire Bid as fair.
- I

- (f) 24 March 2014 – When the Aspire Bid was being discussed and finalised, plaintiff and all other directors except for his brother, See Teow Koon expressly accepted the Aspire Bid. A
- (g) 9 April 2014 – Plaintiff's acceptance of the Aspire Bid was again reaffirmed at Kian Joo's board meeting by, *inter alia*, approving the draft circular in respect of the Aspire Bid. B
- (h) 15 April 2014 – Annual general meeting ('AGM') of Box- Pak, D7 whereby the plaintiff retired as director of Box-Pak and was not re-elected (exhs. KJ-40 to 42, encl. 22) (which I shall deal later in relation to D7). C
- (i) 15/4/2014 – Plaintiff first voiced his dissent in respect of the Aspire Bid by way of a letter addressed to the board of Kian Joo, which was copied to both Bursa Malaysia and the Securities Commission, *inter alia*, stating he found many elements of conflict of interest between Can-One, Chee and Yeoh ('letter of dissent')(exh. KJ-43/676 encl. 22). D
- (j) 17 April 2014 – Kian Joo made announcement in relation to the plaintiff's change of heart "is in the light of the letter of interest that was received from Toyota Tsusho Corporation" (exh. KJ-44, encl. 22).
- (k) 28 April 2014 – As a result of his letter, Bursa Malaysia enquired into plaintiff's allegation that Yeoh and Chee were related parties. At Bursa Malaysia's request, both Yeoh and Chee separately affirmed a statutory declaration confirming that they are not related and the same have been deposited with Bursa Malaysia (exh. KJ-49, encl. 22). E
- (l) 6 May 2014 – Plaintiff commenced this action. F

[40] It can be seen that the plaintiff did not raise any complaint during the deliberation of the Aspire Bid until he "made a U-turn" on 15 April 2014 when he was not re-elected as director of D7. Despite the letter of dissent of 15 April 2014 pertaining to his fiduciary duties and that a complete set of documents would be sent to the board of directors of Kian Joo, the said documents were not forthcoming. It is significant to note that an "independent director" is defined as "a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgment or the ability to act in the best interests of an applicant or a listed issuer" (para. 1.01 of the listing requirements). It cannot be gainsaid that the Aspire Bid was conducted under a heavily regulated environment; that the plaintiff did not take issue with any independent directors and granted that at least on five occasions the plaintiff did not bring up any complaint in respect of the Aspire Bid formally as he now alleges in his letter of dissent of 15 April 2014 to allow the board of directors to decide collectively, it shows that the action filed by the plaintiff is made in bad faith and for a collateral purpose. G
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A [41] The plaintiff sought to advance the argument that his pleading at paras. 136 and 137 of the amended statement of claim is sufficient in having identified two out of seven wrongdoers even though the plaintiff claims the control arose out of the 'indifference' or 'apathy' of the four independent non-executive directors who were appointed in accordance with the listing requirements. If the independent directors were as he claims wrongdoers, then the plaintiff ought to cite them as defendants. If the four independent directors are not named, then they are not wrongdoers and are not in control and the action is liable to be struck out at this stage.

C [42] This claim of the plaintiff is factually incorrect as the plaintiff did not produce any evidence to the independent directors for their consideration; hence Kian Joo's board had no "material credible information" as at 25 April 2014 to find that D1 and D2 were persons connected (see Kian Joo's announcement dated 25 April 2014 exh. KJ-48 p. 701, encl. 22 where "The legal opinion obtained, and relied upon by the company, was to the effect that Can-One Berhad is not a person connected (as defined by listing requirements) with Mr Chee Khay Leong").

D [43] As learned counsel for the second defendant correctly pointed out, the remedy of the plaintiff is if he so wishes, he is at liberty to be present during the EGM to air his grouses and to convince the other shareholders of his position as the Aspire Bid requires 75% of the shareholder's approval.

Is The Action Premature

F [44] In the light of the matters above, I am of the view the action is misconceived as the plaintiff is pre-empting the due process in respect of the jurisdiction of the regulatory authorities, including Bursa and the obligations of Kian Joo under the listing requirements of Bursa in response to the Aspire offer. It cannot be denied that the Aspire Bid is subject to strict regulatory requirements, overseen by the main advisors, independent non-executive advisors and the legal advisor and ultimately to Bursa Malaysia.

G [45] Authorities:

- H (a) *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698; [2009] 4 MLJ 695 where the Court of Appeal at p. 725 para. 41 H (CLJ); p. 719 para. 43 I (MLJ) cited the judgment of Sir Bingham in *R v. Securities and Futures Authority ex p Panton* (unreported); 20 June 1994 as follows: "... that it is not the function of the court in anything other than a clear case to second guess their [regulatory bodies] or, as it were to look over their shoulder".
- I (b) *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd and Another Case* [2012] 7 CLJ 407 p. 429; [2012] 6 MLJ 131 at p. 151 where the High Court at para. 53 held:

The Court had shown reluctance in interfering with Bursa decision in enforcing its objective done in good faith. The principle of non interference is premised on the basis that Bursa is a regulatory body mandated under the law to maintain and promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction.

A

Plaintiff's Claim Against D7

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[46] To reiterate, the plaintiff was not re-elected as director of Box-Pak at its 40th AGM of 15 April 2014 as the resolution for his re-election ie, Resolution 7 did not get enough votes (exh. KJ-41, encl. 22). Further as mentioned before, *vis-a-vis* D7, the plaintiff sought (a) a declaration that the voting of Resolution 7 is null and void; (b) an order that the plaintiff be reinstated as a director and/or managing director of Box-Pak with immediate effect; (c) damages to be assessed and paid to the plaintiff.

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[47] The grounds canvassed by D7 to strike out the plaintiff's claim appears in para. 2(a) to (d) above.

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[48] As stated in para. 31 above, a derivative action is a device allowing a minority shareholder to sue in the company's name for the wrong done to the company. In this instant case, the plaintiff's retirement from the board of D7 resulting from the failure to pass Resolution 7 has nothing to do with the affairs of Kian Joo and therefore there is no basis in fact and in law for a derivative action to be brought by the plaintiff against Box-Pak for this. On this ground alone, I am of the view that the claim against Box-Pak ought to be struck out.

E

[49] I find there are no merits regarding the plaintiff's complaint against Box-Pak's AGM including the voting of Resolution 7 and the allegation that D1's decision to cast Kian Joo's vote against the re-election of the plaintiff at Box-Pak's AGM being inconsistent with Box-Pak's board of directors' decision (of which D1 and D2 are members) on 25 November 2013 of issuing the Box-Pak contract of service extending the plaintiff's tenure as Box-Pak's managing director from 2013 to 2015 (see paras. 123 to 125, 126 to 131 and 132-133 of the amended statement of claim). The reasons being the plaintiff's contract with Box-Pak does not preclude the shareholders of Box-Pak from voting for any resolution to remove the plaintiff, what more to vote against any resolution for his re-election. This is premised on s. 128(1) of the Companies Act 1965 ('CA 1965') which provides:

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(1) A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

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(see *Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1990] 1 LNS 91; [1991] 1 MLJ 91 SC @ 95 H-I left column).

A [50] The plaintiff contended that “Box-Pak has removed the plaintiff as
director not in accordance with s. 128 CA 1965 but rather through his
non-election as a director [t]o achieve a collateral purpose and to circumvent
s. 128 of the CA”. The case of *Pal v. Chatterjee* [2013] O.J. No.924 at
paras. 44 to 46 was cited. Essentially, the plaintiff contended the certificate
B of appointment of authorised corporate representative issued by Kian Joo on
10 July 2012; the Aspire Bid was only made on 25 November 2013 and D1
has a personal interest in the Aspire Bid which was not disclosed to the board
of directors of Kian Joo and D1 ought to have informed the former that he
has a personal interest in Resolution 7 and ought not to rely on the said
C certificate (exh. DAS-16, plaintiff’s affidavit in reply affirmed by the plaintiff
on 26 June 2014, encl. 3) and the plaintiff’s allegation that “Yeoh (D1) is
de facto in control”.

[51] With respect, I find there is no merit in the plaintiff’s contention. I
am of the view that neither the shareholders of Box-Pak owe any fiduciary
D duties or obligations as to how they exercise their votes nor is Box-Pak to
regulate their voting; it is entirely up to the shareholders as to how they cast
their votes. I draw support from the case of *Tuan Ishak bin Ismail v. Leong
Hup Holdings Bhd & 5 Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661
where Mahadev Shankar JCA (as His Lordship then was) at pp. 425-426
E (CLJ); pp. 696-698 (MLJ) opined:

Kenanga Nominees and TA Nominees, the sixth and seventh
respondents, were not directors of KFCM. Even assuming that they as
shareholders would vote along with the other shareholders to expel the
Lau brothers, the power to vote in general meeting is not a fiduciary
F power, and a shareholder owes no duty to anybody as to how he
exercises his vote: *Northern Counties Securities Ltd v. Jackson & Steeple Ltd*
[1974] 2 All ER 625 ...

... In my judgment, these submissions of counsel for the directors are
correct. I think that in a nutshell the distinction is this. When a director
votes as a director for or against any particular resolution in a directors’
G meeting, he is voting as a person under a fiduciary duty to the company
for the proposition that the company should take a certain course of
action. When a shareholder is voting for or against a particular resolution
he is voting as a person owing no fiduciary duty to the company who is
exercising his own right of property to vote as he thinks fit. The fact that
the result of the voting at the meeting (or a subsequent poll) will bind the
H company cannot affect the position that in voting he is voting simply as
an exercise of his own property rights.

Perhaps another (and simpler) way of putting the matter is that a director
is an agent, who casts his vote to decide in what manner his principal shall
act through the collective agency of the board of directors; a shareholder
I who casts his vote in general meeting is not casting it as an agent of the
company in any shape or form. His act, therefore, in voting as he pleases
cannot in any way be regarded as an act of the company.

... Transposed to s. 128(1) of our Act, the proper meaning of 'A public company may by ordinary resolution remove a director ...' means that a simple majority of the shareholders of the company may vote to remove a director and no agreement made by the directors or the company can fetter that right. The courts will not interfere with the statutory right of shareholders to remove directors: *Solaiappan v. Lim Yoke Fan & Ors* [1968] 2 MLJ 21; *Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91, a Supreme Court decision which applied s. 128(1) and upheld the shareholders' right to terminate the appointment of the executive chairman and managing director of the company in the ninth month of a three-year contract with the company appointing him to those positions.

[52] The plaintiff in its submission in reply conceded "It is true that shareholders can by resolution remove a director under s. 128 of the CA. Nevertheless, the statutory requirements of giving the necessary notice to the directors must be complied with". I find D7 has complied with the requirement of s. 128 CA 1965 when the relevant documents on the Aspire Bid (*albeit* it is irrelevant to D7's position) were circulated to all the directors including the plaintiff but not to Mr See Teow Koon as he was no longer a director of Kian Joo after he was not re-elected during Kian Joo's AGM on 16 April 2014. Nevertheless the minutes of Box-Pak's AGM was not circulated to the plaintiff since he was no longer a director of Box-Pak.

[53] There is no requirement that an original of the certificate of appointment of Authorised Corporate Representative need to be lodged prior to an annual general meeting. This certificate was issued pursuant to s. 147(3) of CA 1965. Section 147(3), (4) and (5) of CA 1965 provide:

(3) A corporation may by resolution of its directors or other governing body -

- (a) if it is a member of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of the company or of any class of members; or
- (b) if it is a creditor (including a holder of debentures) of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of any creditors of the company,

and a person so authorized shall, in accordance with his authority and until his authority is revoked by the corporation be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if it were an individual member creditor or holder of debentures of the company.

(4) Where -

- (a) a person present at a meeting is authorized to act as the representative of a corporation at the meeting by virtue of an authority given by the corporation under subsection (3); and

A (b) the person is not otherwise entitled to be present at the meeting, the corporation shall, for the purposes of subsection (1), be deemed to be personally present at the meeting.

B (5) A certificate under the seal of the corporation shall be *prima facie* evidence of the appointment or of the revocation of the appointment (as the case may be) of a representative pursuant to subsection (3).

[54] It is observed there is nothing in the said provision which stipulate such a requirement as contended by the plaintiff.

C [55] Further if there is any challenge to the validity of D1's representation, it ought to be raised at the meeting. I find support for this proposition in the case of *Maori Development Corporation Ltd v. Power Beat International Ltd* [1995] 2 NZLR 568. The plaintiff, MDC was a shareholder in the defendant, PBI; the other shareholder was Tri-Pacific. An extraordinary general meeting of PBI was held to consider certain resolutions requisitioned including six resolutions requisitioned by MDC. Tri-Pacific's directors resolved that one Jillings would be appointed as proxy "to attend and act on behalf of Tri-Pacific at that meeting". It gave oral instructions to Mr Jillings as to how he should vote on the proposed resolutions. It attempted to fax a notice of appointment of proxy to MDC but the attempted transmissions failed. D Mr Jillings attended the meeting, signed in as agent of Tri-Pacific, addressed the meeting as representative of Tri-Pacific, and was treated as such by those board members of PBI present, and took pains to sign the polls on the proposed resolutions as proxy on behalf of Tri-Pacific. His votes were disallowed by the chairman of the board of PBI on the ground that the articles of association and the Companies Act 1955 had not been complied with. E F The plaintiff sought review of the decision of the defendant company and the chairman of its board declaring the decision to reject certain votes cast at the EGM by a representative of a shareholder company (Jillings) invalid and declaring the vote cast as valid and the resolving resolutions accordingly (see headnotes).

G [56] The High Court held:

H Mr Jillings had attended, not only as a purported proxy, but also as representative of Tri-Pacific in accordance with s. 143 of the Companies Act 1955 and held an appointment sufficient to authorize him so to act. The right to vote pursuant to s. 143 depended on whether a valid resolution conferring authority to do so had in fact been passed and not upon the production of evidence at the meeting that this had been done. The decision of the chairman to reject Tri-Pacific's vote was a decision made contrary to the Act and the articles and had therefore been wrong with the result that the vote was valid.

I (see p. 568 lines 37 to 45)

[57] At p. 576 lines 31 to 34, the High Court held “Further, if no objection is taken to the representation and no inquiry made as to the status of the representative prior to the declaration by the chairman of the result of the poll, the representative must be taken to have validly cast the vote of the corporate shareholder”. (see also p. 576 lines 14-31 & 34-43).

A

[58] It is observed that s. 143(1)(a) and s. 143(2) of the New Zealand Companies Act 1955 is somewhat similar to s. 147(3) of CA 1965. Therefore following the persuasive authority of *Maori Development Corporation Ltd (supra)*, if there is to be any challenge to the certificate of appointment of Authorised Corporate Representative, it has to be at the AGM itself, otherwise D1 must be taken to have validly cast the vote of the corporate shareholder.

B

C

[59] In relation to the plaintiff’s contract of service with Box-Pak, the plaintiff sought as against Box-Pak, *inter alia*, for the following relief:

(xii) A declaration that the voting on Resolution 7 at the Annual General Meeting of Box-Pak on 15/4/2014 is null and void;

D

(xiii) An order that the Plaintiff be reinstated as a Director and/or Managing Director of Box-Pak with immediate effect;

(xiv) Alternatively, damages to be assessed by this Honourable Court and to be paid to the Plaintiff.

E

[60] I agreed with D7’s reliance on the case of *Mohd Ahmad v. Yang Dipertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135; [1997] 2 MLJ 361 whereby the Federal Court held (held 1):

The principle is that the court will not order specific performance of a contract of service between master and servant, except where: (i) a claimant/employee before an Industrial Court claiming for reinstatement on ground of dismissal without just cause or excuse under s. 20 of the Industrial Relations Act 1967; and (ii) a holder of any public office as set out in art 132 of the Federal Constitution.

F

[61] Following the said proposition of law, accordingly the relief sought for by the plaintiff cannot stand and the action ought to be struck out.

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[62] With regard to the aforesaid judgment *Mohd Ahmad (supra)*, the plaintiff drew to the court’s attention the following passages for the court’s consideration:

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At p. 370 at paragraph I to p. 371 at paragraph B which reads:

A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and a declaration that the dismissal is wrongful on the other. The first-mentioned declaration may be granted by the court with what in effect is a reinstatement, ie that he continues in the employ, etc. The second-mentioned declaration is invariably granted with an order for

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- A damages only by virtue of the principle. When a dismissal is merely wrongful, at some risk of repetition, a plaintiff is left only with a remedy in damages by virtue of the principle. When a dismissal is void, or invalid, the dismissal that took place earlier never in effect, effectively took place because it is void, so the old job continues.
- B At p. 372 at paragraph E to G which reads:
- C We are, however, of the opinion that in regard to the 'preliminary objection', there was no prior express agreement by the parties herein at the time it was raised that it would conclusively decide the whole case one way or another. That being so, in the context of issues in this case, and in view of the express relief sought in the statement of claim - in particular, the claim for damages for wrongful dismissal - we think that the court below has gone too far in dismissing wholly the claim of the supervisor.
- D We therefore allow this appeal, set aside the order of the court below and dismiss the summon in chambers dated 5 November 1990 for striking out the statement of claim. We further order that the action herein be fixed for an early hearing to determine whether the appellant's dismissal was wrongful or improper; and if so, to assess damages, if any. We make no order as to costs here and below. The deposit of RM500 in court is to be refunded to the appellant.
- E [63] With respect, I am of the view the passages relied on by the plaintiff are of no assistance to the plaintiff. I am of the view that by relying on the passage at p. 370 para. I to p. 371 para. B, the plaintiff is in effect reaffirming that he is seeking a reinstatement with respect to the plaintiff's contract of
- F service with Box-Pak, which this court is not permitted to grant based on the Federal Court's decision in *Mohd Ahmad* at para. 60 above.
- G [64] As for the second passage at p. 372 paras E-G reproduced above, it is appropriate to refer to the facts of the case as per the headnotes. The appellant who was employed by a local authority ('the first respondent') as a market supervisor was dismissed by the latter. The appellant sued the respondents for, *inter alia*, a declaration that his dismissal was void and of no effect, and that he was still a market supervisor, and entitled to all salary and benefits of his employment. Counsel for the first respondent raised a 'preliminary objection' to the appellant's claim for reinstatement. The
- H objection was allowed and the whole claim of the appellant was dismissed with cost. The appellant appealed. Counsel for the respondents argued that the appellant was an employee appointed under the Local Government Act 1976 and thus was not a public officer to be entitled to make a claim for reinstatement. The appellant submitted otherwise as the usual Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the General
- I Orders') applicable to public officers were made expressly applicable to the appellant and were used in dismissing him.

[65] In *Mohd Ahmad* the Federal Court at p. 365G-H observed that “learned counsel for the local council then appearing adopted an unusual way of proceeding with the summons by raising a ‘preliminary objection’ based primarily on the ground that the supervisor had no right to ask for the declarations that: (a) his dismissal was void; and (b) he still continued in his post. Learned counsel was in effect objecting to the supervisor’s claim for reinstatement to the latter’s former post from which he was dismissed. We, of course, would treat such ‘preliminary objection’ as a misnomer for her submission in support of her application”. The pleaded case in this instant case is different; no preliminary objection was raised by D7 but from the outset, D7 sought to strike out the plaintiff’s application on the grounds alluded to in para. 2(a) to (d) above, the merits of which I have addressed above.

Conclusion

[66] For the foregoing reasons I find that the plaintiff’s claim is frivolous, vexatious or otherwise is an abuse of the process of the court. Accordingly I had allowed the defendants’ application as per para. 10 above.

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